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April 4, 2005

213684



By UPS overnight mail

Vernon A. Williams, Secretary
Surface Transportation Board
Case Control Unit, Suite 713
1925 K Street, N.W.
Washington, DC 20423-0001

ENTERED
Office of Proceedings

APR 5 2005

Part of
Public Record

Re: Docket No. AB-878, *City of Peoria, Illinois and Village of Peoria Heights, Illinois -- Adverse Discontinuance -- Pioneer Industrial Railway Co.*

Dear Mr. Williams:

Enclosed please find an original and 10 copies of Reply In Opposition To Protests, for filing with the Board in the above referenced matter.

Very truly yours,

Tom McFarland

Thomas F. McFarland
Attorney for Applicants

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BEFORE THE
SURFACE TRANSPORTATION BOARD

213684



CITY OF PEORIA, ILLINOIS AND
VILLAGE OF PEORIA HEIGHTS,
ILLINOIS -- ADVERSE
DISCONTINUANCE -- PIONEER
INDUSTRIAL RAILWAY CO.

DOCKET NO. AB-878

REPLY IN OPPOSITION TO PROTESTS

ENTERED
Office of Proceedings

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Public Record

CITY OF PEORIA, ILLINOIS
CITY HALL
419 Fulton Street
Peoria, IL 61602

VILLAGE OF PEORIA HEIGHTS, ILLINOIS
VILLAGE HALL
4901 North Prospect Rd.
Peoria Heights, IL 61616

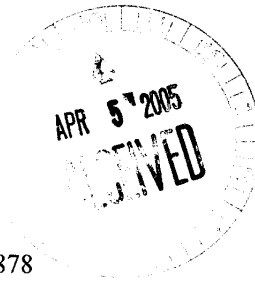
Applicants

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Attorney for Applicants

DATE FILED: April 5, 2005

BEFORE THE
SURFACE TRANSPORTATION BOARD



CITY OF PEORIA, ILLINOIS AND
VILLAGE OF PEORIA HEIGHTS,
ILLINOIS -- ADVERSE
DISCONTINUANCE -- PIONEER
INDUSTRIAL RAILWAY CO.

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DOCKET NO. AB-878

REPLY IN OPPOSITION TO PROTESTS

Pursuant to the Board's procedural decision served February 24, 2005, the CITY OF PEORIA, ILLINOIS and the VILLAGE OF PEORIA HEIGHTS, ILLINOIS ("the Municipalities") hereby reply in opposition to Protests filed by Pioneer Industrial Railway Co. ("PIRY") and Keokuk Junction Railway Co. ("KJRY") on March 21, 2005.

OVERVIEW

The Protests should be denied because they are not directed at the sole issue in this proceeding: i.e., whether discontinuance of PIRY's rail service over the Kellar Branch is permitted or required by the present or future public convenience and necessity, within the meaning of that term in 49 U.S.C. § 10903(d).

THE DECISIONAL STANDARD

Decisions in adverse discontinuance proceedings under § 10903(d) establish the principle that the owner of a rail line should be permitted to replace the operator of the line unless shippers on the line and/or the community would be harmed as a result of the replacement. *Fore River R.R. Co. - Discon. Exempt. - Norfolk County, MA*, 8 I.C.C2d 307 (1992); *Cheatham County Rail Authority "Application and Petition" for Adverse Discontinuance*, 1992 ICC LEXIS 224 (Docket No. AB-379X, decision served Nov. 4, 1992); *Jacksonville Port Authority - Adverse*

Discon. - in Duval County, FL, 1996 STB LEXIS 200 (Docket No. AB-469, decision served July 17, 1996); and *Tacoma Eastern Ry. Co. - Adverse Discon. of Oper. Applic. - a Line of the City of Tacoma*, 1998 STB LEXIS 790 (Docket No. AB-548, decision served Oct. 16, 1998). Thus, the focus in an “operator replacement” adverse discontinuance case is whether shippers would be adversely affected by a change of rail line operators.

DURATION OF THE OPERATING AGREEMENT IS IMMATERIAL

PIRY attempts to distinguish those decisions on the ground that the lease agreements in those cases had been terminated whereas PIRY’s contractual right to operate the Branch has not been terminated. (PIRY Protest at 6). PIRY’s Protest is replete with argument that its Operating Agreement with the Municipalities has not expired by its terms, i.e., that the Agreement has a perpetual term rather than a 20-year term, as claimed by the Municipalities. (PIRY Protest at 2-4).

PIRY’s argument in that respect is made in utter disregard of the fact that PIRY recently filed a Petition in Finance Docket No. 34636 seeking a Board declaration that the Operating Agreement is perpetual, which was denied by the Board in *Central Illinois R. Co. - Oper. Exempt. - Rail Lines of the City of Peoria*, 2005 STB LEXIS 113 (Finance Docket Nos. 34518 and 34636, decision served Feb. 23, 2005). The Board there said (at *13):

. . . Generally, we defer in questions of contract interpretation to the courts . . .

PIRY is fortunate that the Board declined to rule on its Petition because the Board was of the opinion that the Agreement has a 20-year term, which has expired. The Board said (*id.* at *10-11):

... (T)he operating agreement between the Cities and P&PU (and PIRY as P&PU's assignee) does not appear to provide for exclusive operating rights or a continual, irrevocable easement. Rather, as the ICC noted in *P&PU Exemption*, the July, 1984 agreement here can apparently be terminated by the Cities after 20 years or for cause ...

The Board's reference to *P&PU Exemption* was to *Peoria and Pekin Union Ry. Co. - Exemption from 49 U.S.C. 10901*, 1984 ICC LEXIS 275 (Finance Docket No. 30545, decided Sept. 18, 1984), where the ICC said (at *1-2):

... The term of the agreement is 20 years ...

The upshot is that the Board need not rule on whether the PIRY Operating Agreement has expired in order to determine whether discontinuance of PIRY's rail service is permitted by public convenience and necessity. It follows that the continued existence or expiration of that Agreement cannot constitute a valid ground for distinguishing the decisions cited above which set forth the applicable standard for determining public convenience and necessity.

**CONVERSION OF A PORTION OF THE BRANCH INTO A
RECREATIONAL TRAIL IN THE FUTURE IS IMMATERIAL**

PIRY argues that the application should be denied because the Branch will be operated in its entirety only for a short time, after which the majority of the Branch will be converted into a recreational trail, thereby effecting an abandonment. On that basis, PIRY contends that the Municipalities intend to abandon most of the Branch without Board authority. (PIRY Protest at 2-3, 6-7).

As a result of acquisition of another rail line and construction of a track connecting that line to the Branch, rail service will be able to be provided to all shippers on the Branch in a manner that would result in a 6.29-mile portion of the Branch becoming unused and unneeded for the provision of such service. The Municipalities have freely acknowledged that they plan to

convert that unneeded portion of the Branch into a recreational trail. Such a conversion would not result in a loss of rail service for any shipper on the Branch.

There are several reasons why PIRY's argument on this subject is not material. First, the Branch constitutes abandoned rail property whose ultimate disposition is not subject to Board jurisdiction.^{1/} The Branch had been abandoned by the Rock Island Trustee before it was acquired by the Municipalities. Consequently, the Branch was and is abandoned rail property which can be abandoned, sold or donated for trail use without Board authorization or exemption. As the ICC said in *Southern Pacific Transp. Co. - Aban. - L.A. County, CA*, 9 I.C.C.2d 385 (1993), at 390:

SP persuasively argues that an exemption is not required, and should not be granted, for the transfer of abandoned rail property. A carrier's authority to dispose of abandoned rail property is not subject to our jurisdiction . . .

Inasmuch as transfer or abandonment of the Branch is not subject to Board jurisdiction, it cannot be an unlawful abandonment for the Municipalities to convert a portion of the Branch into a recreational trail without Board approval. Consequently, there would be no unlawful act on the part of the Municipalities that could bear on their application for adverse discontinuance.

Secondly, even if it could be argued that the Municipalities' prospective conveyance of a portion of the Branch for trail use would be an unlawful abandonment without Board approval, that potential future action does not bear on the merits of the present application for adverse discontinuance of PIRY's rail service. A determination can be made regarding discontinuance of PIRY's rail service on the Branch without regard to the lawfulness of a potential future conveyance of a portion of the Branch for recreational trail use without Board approval or

^{1/} Discontinuance of rail operations over the Branch is subject to the Board's jurisdiction, but abandonment of the Branch is not.

exemption. If and when a portion of the Branch were to be converted into a recreational trail without Board authority, PIRY and anyone else would be free to complain to the Board or to a court about an alleged unlawful abandonment. In other words, consideration of a potential conveyance of a portion of the Branch for trail use in the future would be premature in determining the merits of the adverse discontinuance now pending before the Board.

THE DECISIONS CITED BY PIRY ARE NOT “OPERATOR REPLACEMENT” CASES

The decisions cited at page 3 ^{2/} of PIRY’s Protest are not “operator replacement” adverse discontinuance cases. Instead, they are adverse abandonment cases. Rail service would not be continued for all shippers by a replacement rail operator in any of those decisions. That is a radical difference under the standard of public convenience and necessity. Radically different decisional criteria govern Board disposition of those cases. Consequently, the results of those cases have no bearing on the appropriate disposition of the application at hand.

CLAIMS OF REDUCED MARKETING OPPORTUNITIES ARE NOT SUSTAINED

PIRY and KJRY contend that shippers on the Branch will experience reduced marketing opportunities if the adverse discontinuance application were to be granted. That contention is based on an allegation that the existing connection with Tazewell & Peoria Railroad (TZPR) (formerly P&PU) would be severed as a result of that discontinuance. (PIRY Protest at 5-6, Ex. 2; KJRY Protest). TZPR connects with a number of rail carriers. PIRY contends that the Kellar

^{2/} Those decisions are:

New York Cross Harbor Railroad v. STB, 374 F.3d 1177 (2004 U.S. App. LEXIS 14304 (D.C. Cir., July 13, 2004)); *Salt Lake City Corp. - Adv. Aban. - in Salt Lake City, UT*, (2002 STB LEXIS 150, Docket No. AB-33 [Sub-No. 183], decision served March 8, 2002); and *City of Venice - Aban. Exempt. - in Venice, IL and St. Louis, MO*, 2004 STB LEXIS 381 (Docket No. AB-863X, decided June 22, 2004).

Branch would connect only with Union Pacific if the application were to be granted. (PIRY Protest at 5).

Those claims of reduced marketing opportunities are not accurate. The TZPR connection would not be severed if the adverse discontinuance application were to be granted. In that event, the replacement operator would connect with TZPR, just as PIRY does today. The marketing opportunities for shippers on the Branch would be unchanged.^{3/}

Conversion of a portion of the Branch into a recreational trail at a future date would eliminate the TZPR connection for Carver Lumber and Peoria Plastics, but not for O'Brien Steel. That severance would not result from the proceeding under consideration. Moreover, the affected shippers are aware of the future severance of the TZPR connection, and have not complained about reduced marketing opportunities. Self-serving allegations by PIRY and KJRY in that respect should not be credited in the absence of testimony in behalf of the affected shippers.

CONCLUSION AND REQUESTED RELIEF

WHEREFORE, for the reasons stated, the relief sought in the Protests should be denied.

Respectfully submitted,

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^{3/} The potential loss of single-system PIRY-KJRY service would not result in a major loss of marketing opportunities. (PIRY Protest Ex. 2, KJRY Protest at 3).

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DATE FILED: April 5, 2005

CERTIFICATE OF SERVICE

I hereby certify that on April 4, 2005, I served the foregoing document, Reply In
Opposition To Protests, on the following:

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